

85-170

No.

Office-Supreme Court, U.S.

FILED

JUL 29 1985

ALEXANDER L. STEVAS,
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1985

WILLIAM E. BROCK, SECRETARY OF LABOR,
PETITIONER

v.

UNITED TRANSPORTATION UNION, ET AL.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

CHARLES FRIED

Acting Solicitor General

KENNETH S. GELLER

Deputy Solicitor General

CHARLES A. ROTHFELD

Assistant to the Solicitor General

Department of Justice

Washington, D.C. 20530

(202) 633-2217

FRANCIS X. LILLY

Solicitor of Labor

ALLEN H. FELDMAN

Acting Associate Solicitor

BARBARA J. JOHNSON

Attorney

Department of Labor

Washington, D.C. 20210

BEST AVAILABLE COPY

3519

QUESTION PRESENTED

Whether an employee may challenge, and the Occupational Safety and Health Review Commission may review, a decision by the Secretary of Labor to withdraw a citation charging an employer with violating the Occupational Safety and Health Act of 1970, 29 U.S.C. 651 *et seq.*

II

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, the Cuyahoga Valley Railway Company was a petitioner in the court of appeals; the Occupational Safety and Health Review Commission was a respondent.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	2
Statutory provision involved	2
Statement	3
Reasons for granting the petition	8
Conclusion	21
Appendix A	1a
Appendix B	3a

TABLE OF AUTHORITIES

Cases:

<i>American Bakeries Co.</i> , 1984 O.S.H. Dec. (CCH)	
¶ 29,956	10, 14, 19
<i>Atlas Roofing Co. v. OSHRC</i> , 430 U.S. 442	4
<i>Copperweld Steel Co.</i> , 1984 O.S.H. Dec. (CCH)	
¶ 26,956	10, 19
<i>Dale M. Madden Construction, Inc. v. Hodgson</i> ,	
502 F.2d 278	12
<i>Donovan v. A. Amorello & Sons, Inc.</i> , 761 F.2d 61..	14
<i>Donovan v. Allied Industrial Workers</i> , 760 F.2d	
783	9, 11, 15, 17
<i>Donovan v. International Union Allied Industrial</i>	
<i>Workers</i> , 722 F.2d 1415	9, 10, 11, 12, 13, 14, 15,
	16, 17, 19, 20
<i>Donovan v. Local 962, International Chemical</i>	
<i>Workers Union</i> , 748 F.2d 1470	9, 11, 17
<i>Donovan v. OSHRC</i> , 713 F.2d 918....	9, 10, 11, 12, 13, 14, 17
<i>Donovan v. Oil, Chemical & Atomic Workers</i> , 718	
F.2d 1341, cert. denied, No. 83-1298 (May 14,	
1984)	9, 11, 17, 18, 19, 21
<i>Donovan v. Red Star Marine Services, Inc.</i> , 739	
F.2d 774, cert. denied, No. 84-590 (Feb. 25,	
1985)	6
<i>Donovan v. United Steelworkers</i> , 722 F.2d 1158....	9, 11, 17

IV

Cases—Continued:

	Page
<i>Heckler v. Chaney</i> , No. 83-1878 (Mar. 20, 1985)	13-14, 19, 20, 21
<i>Marshall v. Oil, Chemical & Atomic Workers</i> , 647 F.2d 383	20
<i>Marshall v. OSHRC</i> , 635 F.2d 544	8
<i>Marshall v. Sun Petroleum Products Co.</i> , 622 F.2d 1176, cert. denied, 449 U.S. 1061	9, 11, 17
<i>Mobil Oil Corp.</i> , 1982 O.H.S. Dec. (CCH) ¶ 26,187, rev'd, 713 F.2d 918	7, 9, 11
<i>Oil, Chemical & Atomic Workers v. OSHRC</i> , 671 F.2d 643, cert. denied, 459 U.S. 905	9-10, 11, 13, 15, 16, 17, 18
<i>Pan American World Airways, Inc.</i> , 1984 O.S.H. Dec. (CCH) ¶ 26,290	14
<i>Potomac Electric Co. v. Director, OWCP</i> , 449 U.S. 268	14
<i>United States v. Goodwin</i> , 457 U.S. 368	16
<i>Whirlpool Corp. v. Marshall</i> , 445 U.S. 1	3

Statutes:

Occupational Safety and Health Act of 1970, 29 U.S.C. 651 <i>et seq.</i>	3
29 U.S.C. 650 (c) (§ 10 (c))	2
29 U.S.C. 653 (b) (1)	5
29 U.S.C. 654 (a)	3
29 U.S.C. 654 (a) (1)	5
29 U.S.C. 655 (a)	11
29 U.S.C. 655 (b) (1)	18
29 U.S.C. 655 (b) (6) (B) (v)	18
29 U.S.C. 655 (d)	18
29 U.S.C. 657 (a)	3, 12
29 U.S.C. 657 (e)	18
29 U.S.C. 657 (f)	12
29 U.S.C. 657 (f) (1)	18
29 U.S.C. 657 (f) (2)	18
29 U.S.C. 658	12
29 U.S.C. 658 (a)	3, 12, 19
29 U.S.C. 659	12
29 U.S.C. 659 (a)	3, 12
29 U.S.C. 659 (b)	4, 20

Statutes—Continued:

Page

29 U.S.C. 659 (c)	2, 3, 4, 5, 7, 8, 12, 15, 16, 17, 18, 20
29 U.S.C. 660	4, 20
29 U.S.C. 661	12
29 U.S.C. 661 (g)	15
29 U.S.C. 661 (j)	4, 6
29 U.S.C. 662 (d)	18
29 U.S.C. 666	3, 12

29 C.F.R.:

Section 2200.20 (a)	4
Section 2200.33	4, 5, 10, 15

Miscellaneous:

Staff of Senate Comm. on Labor and Public Welfare, 92d Cong., 1st Sess., <i>Legislative History of the Occupational Safety and Health Act of 1970</i> (S. 2193, Pub. L. No. 91-596) (Comm. Print 1971)	11, 13, 15, 18
--	----------------



In the Supreme Court of the United States

OCTOBER TERM, 1985

No.

WILLIAM E. BROCK, SECRETARY OF LABOR,
PETITIONER

v.

UNITED TRANSPORTATION UNION, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Solicitor General, on behalf of the Secretary of Labor, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 2a-14a)¹ is reported at 748 F.2d 340. The opinion of the Occupational Safety and Health Review Commission (Pet. App. 15a-21a) is reported at 1982 O.S.H.

¹ Because the petition in No. 84-1634, with one exception (App., *infra*, 1a), contains all of the materials required by this Court's Rule 21.1(k), those materials are not reprinted as an an appendix to this petition. The appendix to No. 84-1634 is referred to hereafter as "Pet. App."

Dec. (CCH) ¶ 26,296. The order of the administrative law judge (Pet. App. 22a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 20, 1984. A petition for rehearing was denied on March 1, 1985 (App., *infra*, 1a). On May 21, 1985, Justice O'Connor extended the time within which to file a petition for a writ of certiorari to June 29, 1985; on June 21, 1985, Justice O'Connor further extended the time within which to file a petition to and including July 29, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

STATUTORY PROVISION INVOLVED

Section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. 659(c), provides:

If an employer notifies the Secretary that he intends to contest a citation issued under section 658(a) of this title or notification issued under subsection (a) or (b) of this section, or if, within fifteen working days of the issuance of a citation under section 658(a) of this title, any employee or representative of employees files a notice with the Secretary alleging that the period of time fixed in the citation for the abatement of the violation is unreasonable, the Secretary shall immediately advise the Commission of such notification, and the Commission shall afford an opportunity for a hearing (in accordance with section 554 of title 5 but without regard to subsection (a)(3) of such section). The Commission shall thereafter issue an order, based on findings of fact, affirming, modifying, or vacating the Secretary's citation or proposed penalty, or directing other appropriate relief,

and such order shall become final thirty days after its issuance. Upon a showing by an employer of a good faith effort to comply with the abatement requirements of a citation, and that abatement has not been completed because of factors beyond his reasonable control, the Secretary, after an opportunity for a hearing as provided in this subsection, shall issue an order affirming or modifying the abatement requirements in such citation. The rules of procedure prescribed by the Commission shall provide affected employees or representatives of affected employees an opportunity to participate as parties to hearings under this subsection.

STATEMENT

1. The Occupational Safety and Health Act of 1970 (Act or OSH Act), 29 U.S.C. 651 *et seq.*, establishes a comprehensive set of procedures that permit the Secretary of Labor to assure safe and healthful conditions in the workplace. To this end, the Act empowers the Secretary to inspect work sites to uncover noncompliance with statutory safety and health requirements. 29 U.S.C. 657(a); see 29 U.S.C. 654(a). If he discovers a violation during such an inspection, the Act authorizes the Secretary to issue a written citation to the offending employer that "fix[es] a reasonable time for the abatement of the violation" (29 U.S.C. 658(a)); the Secretary also may assess a penalty for violation of his safety standards. 29 U.S.C. 666; see 29 U.S.C. 659(a). See generally *Whirlpool Corp. v. Marshall*, 445 U.S. 1, 9 n.11 (1980).

The Act's enforcement provisions are contained in 29 U.S.C. 659. Section 659(a) provides that a citation or penalty issued by the Secretary becomes final—and hence unreviewable—if not challenged by the

employer within 15 days.² In cases where the employer contests the citation, the Secretary is directed to notify the Occupational Safety and Health Review Commission (Commission) of the challenge. 29 U.S.C. 659(c). If the Secretary intends to seek enforcement of the citation despite the employer's contest, the Commission's regulations require the Solicitor of Labor to file a complaint with the Commission within 20 days; the employer must file an answer within 15 days. 29 C.F.R. 2200.33. Once these pleadings are filed, a hearing to determine the validity of the citation will be held before an administrative law judge (ALJ) (see 29 U.S.C. 659(c), 661(j)), with discretionary review by the Commission (see 29 U.S.C. 661(j)) and judicial review (see 29 U.S.C. 660) available. See generally *Atlas Roofing Co. v. OSHRC*, 430 U.S. 442, 445-447 (1977).

Section 659(c) also provides certain substantive and procedural rights to employees. Employees and their representatives are given 15 days from the date of issuance of a citation to challenge as unreasonable "the period of time fixed in the citation for the abatement of the violation." The same provision also directs the Commission to prescribe rules of procedure that "provide affected employees or representatives of affected employees an opportunity to participate as parties to hearings under [Section 659(c)]."³

² Similarly, Section 659(b) gives an employer 15 days to object to the Secretary's determination that the employer has failed to remedy a violation within the abatement period; if an objection is not timely filed, the Secretary's determination and any accompanying penalties become final and unreviewable.

³ The Commission has prescribed such a rule (29 C.F.R. 2200.20(a)), which provides that "[a]ffected employees may

2. a. On February 27, 1976, the Secretary cited respondent Cuyahoga Valley Railway Company (Cuyahoga),⁴ a railway operator, for a violation of the OSH Act (Pet. App. 3a, 15a-16a).⁵ Cuyahoga contested the citation in a timely fashion, as required by 29 U.S.C. 659(c). The Secretary in turn filed a formal complaint with the Commission pursuant to 29 C.F.R. 2200.33, and Cuyahoga filed an answer. Pet. App. 3a. Respondent United Transportation Union (Union), which represents Cuyahoga employees, meanwhile asserted its right under 29 U.S.C. 659(c) to intervene as a party (Pet. App. 3a).

At a calendar call hearing before the administrative law judge held on August 24, 1976, however, the Secretary moved to vacate the citation because he had concluded that the working conditions at issue were exempt from coverage under the Act.⁶ Although

elect to participate as parties at any time before the commencement of the hearing before the judge, unless for good cause shown, the Commission or judge allows such election at a later time."

⁴ Cuyahoga has filed a petition for a writ of certiorari (No. 84-1634) to review the judgment of the court of appeals in this case.

⁵ In particular, the Secretary charged Cuyahoga with failing to "[a]dequately instruct and enforce rules when employees are required to couple and/or uncouple ingot buggy cars with stools" or to "[m]aintain an adequate clearance between ingot buggy stools to permit employees to perform their duties safely when it requires them to place themselves between two buggies" (Pet. App. 16a n.1), in violation of 29 U.S.C. 654(a)(1).

⁶ The Secretary based this conclusion on 29 U.S.C. 653(b)(1), which makes the Act inapplicable to the "working

the Union objected (see Pet. App. 3a-4a, 17a-18a), the ALJ granted the Secretary's request on September 28, 1976, and vacated the citation and proposed penalty (*id.* at 22a).

b. Shortly afterwards, the Commission, acting sua sponte, directed review of the ALJ's order pursuant to 29 U.S.C. 661(j) (Pet. App. 18a & n.4). In early 1977 the Secretary responded to this order, reiterating his view that portions of the citation involved matters outside the OSH Act, and explaining that he had "determined in his prosecutorial discretion that [the] additional portions of the citation and complaint [that arguably involved matters within the Act] should not be litigated because an evaluation of the evidence herein led to the conclusion that * * * no useful purpose, either with respect to employee safety or the proper allocation of the Secretary's resources, would be served by litigation of these additional allegations" (App., *infra*, 5a). The Secretary also noted that the record before the Commission was inadequate for a resolution of the legal issues posed (*id.* at 4a). And he maintained that employees have no right under the Act to challenge the Secretary's decision to withdraw a complaint (*id.* at 5a).

Almost six years later, on October 29, 1982, the Commission, by a divided vote, rejected the Secre-

conditions of employees with respect to which other Federal agencies * * * exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health." See generally *Donovan v. Red Star Marine Services, Inc.*, 739 F.2d 774 (2d Cir. 1984), cert. denied, No. 84-590 (Feb. 25, 1985). Here, the Secretary determined that the Federal Railway Administration had issued safety regulations covering the working conditions at issue. See Pet. App. 3a, 16a-17a.

tary's arguments and remanded the case to the ALJ for consideration of the Union's objections to the withdrawal of the citation. Relying on its decision in *Mobil Oil Corp.*, 1982 O.H.S. Dec. (CCH) ¶ 26,187, rev'd, 713 F.2d 918 (2d Cir. 1983), which had held that employee representatives who elect party status under 29 U.S.C. 659(c) may challenge the terms of a settlement agreement between the Secretary and an employer, the Commission concluded that an employee representative "may object to the Secretary's motion to withdraw [a] citation" (Pet. App. 18a-19a). The Commission accordingly ruled that the ALJ in this case erred in failing to "consider[] the merits of [the Union's] objection" to withdrawal of the complaint against Cuyahoga (*ibid.*). Chairman Rowland dissented from this conclusion, maintaining that "the decision to withdraw a citation is within the prosecutorial discretion of the Secretary" (*id.* at 19a n.5).

c. On appeals by the Secretary and Cuyahoga, the court of appeals affirmed the Commission's conclusion that the Commission may review the Secretary's withdrawal of a citation after a complaint and answer have been filed. The court acknowledged that the Secretary "has the sole authority to determine whether to prosecute," but explained that in this case he "had already made the decision to prosecute by filing a complaint and that complaint had been answered at the time the Secretary attempted to withdraw the cita[t]ion" (Pet. App. 7a). Because the "adversarial process" thus "was well-advanced at the time the Secretary attempted to withdraw the citation," the court held that the Commission, "as the adjudicative body, had control of the case and

the authority to review the Secretary's withdrawal of the citation" (*ibid.*).⁷

The court of appeals also held that 29 U.S.C. 659 (c) accords employee representatives the right to object to the Secretary's withdrawal of a citation once a complaint and answer have been filed. The court read Section 659(c) as providing for two types of proceedings before the Commission: those initiated by employers through the "filing of a notice of contest to a citation," and those initiated by employees "to contest the period set in a citation for the abatement of a violation" (Pet. App. 9a). Relying on the Commission's *Mobil Oil* decision (Pet. App. 9a) and the Act's legislative history (*id.* at 11a), the court concluded that Section 659(c) does not limit the scope of employee participation in employer-initiated proceedings; the court therefore held that, in this employer-initiated case, "the Union has full rights, as parties [*sic*], to contest the withdrawal of this citation" (Pet. App. 10a).

REASONS FOR GRANTING THE PETITION

In holding that the Commission may review the Secretary's decision to withdraw a citation issued under the OSH Act, the Sixth Circuit has brought itself into conflict with eight other courts of appeals. As each of those courts has recognized, the Act gives the Secretary sole responsibility for enforcement of its safety and health standards; in contrast, it accords the Commission and interested employees no

⁷ The court of appeals thus distinguished its decision in *Marshall v. OSHRC*, 635 F.2d 544 (6th Cir. 1980), which held that neither the Commission nor a union may prevent the Secretary from withdrawing a citation *prior* to the filing of a complaint.

independent role in determining when maintenance of an enforcement action is appropriate. The decision below entirely disregards the import of this statutory scheme.

In so doing, the court of appeals' ruling threatens both to make the Act's enforcement system unworkable and to disrupt the Secretary's enforcement policies. By subjecting the Secretary's OSH Act enforcement efforts in the Sixth Circuit to a unique set of constraints, the decision below will likely "precipitate administrative chaos." *Donovan v. Oil, Chemical & Atomic Workers (American Petrofina)*, 718 F.2d 1341, 1353 (5th Cir. 1983), cert. denied, No. 83-1298 (May 14, 1984). In these circumstances, review of the decision below by this Court plainly is warranted.

1. The decision below cannot be reconciled with decisions of the Second, Third, Fourth, Fifth, Seventh, Eighth, Eleventh, and District of Columbia Circuits to the effect that the Commission lacks the authority to review the Secretary's withdrawal of a citation. See *Donovan v. OSHRC (Mobil Oil)*, 713 F.2d 918, 925-931 (2d Cir. 1983); *Marshall v. Sun Petroleum Products Co.*, 622 F.2d 1176, 1184-1186 (3d Cir.), cert. denied, 449 U.S. 1061 (1980); *Donovan v. United Steelworkers (Monsanto)*, 722 F.2d 1158, 1160 (4th Cir. 1983); *American Petrofina*, 718 F.2d at 1352-1353; *Donovan v. Allied Industrial Workers (Midland)*, 760 F.2d 783, 785 (7th Cir. 1985); *Donovan v. International Union Allied, Industrial Workers (Whirlpool)*, 722 F.2d 1415, 1419-1421 (8th Cir. 1983); *Donovan v. Local 962, International Chemical Workers Union (Engelhard)*, 748 F.2d 1470, 1472-1473 (11th Cir. 1984); *Oil, Chemical & Atomic Workers v. OSHRC (American Cyana-*

mid), 671 F.2d 643, 650-651 & n.7 (D.C. Cir.) (dictum), cert. denied, 459 U.S. 905 (1982).⁸

None of these courts has accepted the Sixth Circuit's view that the Secretary's decision to withdraw a citation is reviewable if it is made after the Secretary has filed a complaint pursuant to 29 C.F.R. 2200.33.⁹ To the contrary, these courts of appeals

⁸ These decisions arose in the context of settlement agreements in which the Secretary withdrew or modified his citation or the requested relief, and the employer in turn withdrew its notice of contest. As the courts of appeals themselves have noted, such a settlement is no different in principle from the simple withdrawal of a citation by the Secretary without a formal settlement agreement between the parties. See, e.g., *Whirlpool*, 722 F.2d at 1420 ("as a natural incident to his enforcement powers, [the Secretary] has the discretion to withdraw or settle citations"); *Mobil Oil*, 713 F.2d at 927 ("[a] necessary incident to the Secretary's prosecutorial powers is the unfettered discretionary authority to withdraw or settle a citation issued to an employer"); *American Cyanamid*, 671 F.2d at 650 ("included within the prosecutorial power is the discretion to withdraw or settle a citation issued to an employer"). Similarly, the Commission has recognized that the decisions cited in text involved "the Secretary's withdrawal of a citation," and are controlling even in cases in which the withdrawal is not accompanied by a settlement. See *American Bakeries Co.*, 1984 O.S.H. Dec. (CCH) ¶ 26,951, reprinted at Pet. App. 23a-30a; *Copperweld Steel Co.*, 1984 O.S.H. Dec. ¶ 29,956, reprinted at Pet. App. 31a-35a. In either case, the question is whether the Commission has jurisdiction to review the Secretary's conclusion that he "does not wish to prosecute the citation further." *Whirlpool*, 722 F.2d at 1419.

⁹ Two of the decisions cited above specifically noted that a complaint and answer had been filed, and nevertheless explained that the Secretary's decision to withdraw or modify

have explained that the Act gives the Commission only one carefully circumscribed role: it may resolve employer (and, in certain limited circumstances, employee) challenges to citations issued by the Secretary. They accordingly have concluded that withdrawal of the employer's notice of contest or the Secretary's citation destroys the Commission's jurisdiction to resolve the case before it. These holdings, which were entirely disregarded by the court below, follow directly from the language and structure of the OSH Act.

a. At the outset, "it is apparent from the detailed statutory scheme that the public rights created by the Act are to be protected by the Secretary * * * and that enforcement of the Act is the sole responsibility of the Secretary." *Mobil Oil*, 713 F.2d at 927. See *Whirlpool*, 722 F.2d at 1419; *American Petrofina*, 718 F.2d at 1346; *Sun Petroleum*, 622 F.2d at 1187. Thus, the Secretary sets the substantive standards for safety in the workplace (see 29 U.S.C. 655(a)); Staff of the Senate Comm. on Labor and Public Welfare, 92d Cong., 1st Sess., *Legislative History of the Occupational Safety and Health Act of 1970* (S. 2193, Pub. L. No. 91-596), at 141, 145 (Comm. Print 1971) [*hereinafter Leg. Hist.*], and he determines when a

his citation was unreviewable. See *American Cyanamid*, 671 F.2d at 645-646; *Sun Petroleum*, 622 F.2d at 1178. While the other opinions cited in text do not mention whether complaints had been filed at the time that the settlements were reached, a review of the administrative decisions and records in these cases demonstrates that complaints were filed in them as well. See *Midland*, I R. at 5, 6; IV R. at 1-2; *Engelhard*, I R. at 1-6; R. Excerpts at 3; *Whirlpool*, I R. at 1-8, 1-4; III R. at 1-5; *Monsanto*, J.A. at 6-10; *American Petrofina*, III R. at 1-8, 1-4; VI R. at 1-2.

work site should be inspected (29 U.S.C. 657(a) and (f)). It is "[o]nly [the Secretary who] has the authority to determine if a citation should be issued to an employer." *Mobil Oil*, 713 F.2d at 927, citing 29 U.S.C. 658. When a citation is issued, it is the Secretary who sets the abatement period (29 U.S.C. 658 (a)) and the appropriate penalty (29 U.S.C. 659, 666); if the citation is contested, he is the "sole prosecutor" before the Commission. *Whirlpool*, 722 F.2d at 1419; *Mobil Oil*, 713 F.2d at 927. Indeed, even the Secretary's abatement and penalty orders are in large part unreviewable: if a citation or proposed penalty is not challenged within 15 days, it is "deemed a final order of the Commission and not subject to review by any court or agency." 29 U.S.C. 659(a).

In contrast, the Commission has no role in setting enforcement priorities or in determining the types of cases in which citations are appropriately issued. Under Section 659(c), the Commission's sole function is to determine, "based on findings of fact," whether the Secretary's citations should be enforced over an employer's challenge. See also 29 U.S.C. 661. The Commission thus "functions only as a neutral arbiter of disputes between the Secretary and employers, or between the Secretary and employees or unions on the narrow question of the reasonableness of the proposed abatement period." *Whirlpool*, 722 F.2d at 1421. In light of this limited purpose, it is not surprising that the Act gives the Commission no prosecutorial powers (see *Dale M. Madden Construction, Inc. v. Hodgson*, 502 F.2d 278, 279 (9th Cir. 1974)) and no enforcement authority of the sort

often exercised by other federal agencies. See *American Cyanamid*, 671 F.2d at 652.¹⁰

It follows from this statutory division of responsibility that the Secretary's decision to withdraw a citation is not reviewable by the Commission. "A necessary incident to the Secretary's prosecutorial powers is the unfettered discretionary authority to withdraw or settle a citation issued to an employer" (*Mobil Oil*, 713 F.2d at 927; see *Whirlpool*, 722 F.2d at 1420; *American Cyanamid*, 671 F.2d at 650); the Secretary can set enforcement priorities and effectively allocate prosecutorial resources only if he is able to forgo—or to abandon—enforcement efforts that he believes will not be fruitful. See generally *Heckler v. Chaney*, No. 83-1878 (Mar. 20, 1985),

¹⁰ The legislative history points up the Commission's limited role in the enforcement process. As originally introduced, the Act made no provision for the Commission; the Secretary was both to issue citations and to judge employer challenges to those citations. See *Leg. Hist.* 155. This arrangement was criticized on the ground that it would permit the Secretary to "act[] as prosecutor and judge" (*id.* at 392 (remarks of Sen. Javits)), and thus would lead to a "reluctance to rule in favor of an employer." *Id.* at 466 (remarks of Sen. Williams). Senator Javits therefore proposed creation of the Commission (see *id.* at 381) to serve as a buffer between the Secretary and the employers who chose to contest his citations. See *id.* at 392, 464, 470 (remarks of Sen. Javits); *id.* at 429, 466 (remarks of Sen. Williams); *id.* at 471-472 (remarks of Sen. Dominick); *id.* at 473 (remarks of Sen. Holland). The Javits amendment ultimately was adopted (see *id.* at 479) and was incorporated into the Act "to separate the adjudication of violations from the other functions performed by the Secretary of Labor, in order to provide every assurance that fairness and due process would be fully served." *Id.* at 1147 (remarks of Sen. Williams). See generally *Mobil Oil*, 713 F.2d at 930-931 & n.21; *Whirlpool*, 722 F.2d at 1419.

slip op. 9-11. Conversely, permitting review of the Secretary's decision that given enforcement action is inappropriate would involve the Commission in "a policy function [that is] beyond [its] limited jurisdiction." *Mobil Oil*, 713 F.2d at 931. It also would turn on its head the Commission's statutory role as a buffer between potentially "overzealous enforcement of the Act" by the Secretary and those who are affected by the Secretary's affirmative enforcement efforts. *Whirlpool*, 722 F.2d at 1419. See note 10, *supra*.¹¹

b. The court below acknowledged the distinct roles of the Secretary and the Commission, and accordingly recognized that the Secretary's decision to withdraw a citation prior to the filing of a complaint is not reviewable (Pet. App. 6a-7a). The court nevertheless reasoned that once "a formal complaint and answer [have been] filed with the Commission * * * the Sec-

¹¹ In reaching its conclusions in this case, the court of appeals reasoned that the Commission's interpretation of the OSH Act is entitled to deference (Pet. App. 9a, 12a). The Commission, however, has overruled its *Mobil Oil* decision (upon which the court of appeals relied), and now takes the view that it cannot entertain employee challenges to the Secretary's withdrawal of a citation. See *Pan American World Airways, Inc.*, 1984 O.S.H. Dec. (CCH) ¶ 26,920, reprinted at Pet. App. 36a-46a; *American Bakeries Co.*, 1984 OSH Dec. (CCH) ¶ 26,951, reprinted at Pet. App. 23a-30a. In any event, it is the Secretary rather than the Commission who is empowered to set policy regarding enforcement of the Act (see generally *Whirlpool Corp.*, 445 U.S. at 11); his views on the initiation and termination of enforcement proceedings accordingly are entitled to greater weight. See *Donovan v. A. Amorello & Sons, Inc.*, 761 F.2d 61, 64-65 (1st Cir. 1985) (citing cases and noting a conflict among the circuits on this point). Cf. *Potomac Electric Co. v. Director, OWCP*, 449 U.S. 268, 278 n.18 (1980).

retary's role as prosecutor becomes much more limited, and the Commission's role as the adjudicative body takes over" (*id.* at 7a). This approach, however, misconstrues both the complaint process and the nature of the Commission's jurisdiction.

As Congress made clear, it is the existence of a citation and an outstanding notice of contest that trigger Section 659(c)'s "opportunity for a hearing," and thus implicate the Commission's jurisdiction. See *Leg. Hist.* 173. It follows that withdrawal of the citation or notice of contest ousts the Commission of jurisdiction. *Midland*, 760 F.2d at 785; *American Cyanamid*, 671 F.2d at 650. Any other conclusion would make the Commission into something other than "a neutral arbiter of disputes." *Whirlpool*, 722 F.2d at 1421. The Secretary's use of the complaint process, meanwhile, has no independent, substantive significance that should affect this conclusion. The provisions for the filing of a complaint and answer before the Commission are found not in the Act, but in a Commission rule. 29 C.F.R. 2200.33. As such, they can serve only to facilitate the "orderly transaction of [the Commission's] proceedings" (29 U.S.C. 661(g)); they cannot expand the Commission's jurisdiction beyond that spelled out in the statute.

In any event, that a complaint and answer have been filed does not change the discretionary nature of the Secretary's decision to forgo prosecution of a given citation, or make less intrusive the "infringement on the [Secretary's] prosecutorial discretion" that would follow from Commission review of that decision. *Midland*, 760 F.2d at 785. Indeed, given the tight deadlines established by the Act and the Commission rules—an employer must file a notice of contest within 15 days of the issuance of a citation,

and the Secretary must file his complaint within 20 days of receipt of that notice—the Secretary often will be obligated to file complaints as a matter of course to preserve his right to proceed, even if settlement negotiations or analyses of the likelihood of successful enforcement have not yet been completed. The court of appeals' holding that the filing of a complaint marks the point at which the Secretary surrenders his prosecutorial discretion therefore will interfere in a very direct way with his ability to enforce the Act. Cf. *United States v. Goodwin*, 457 U.S. 368, 382 (1982); *Whirlpool*, 722 F.2d at 1421-1422.

2. The court of appeals also concluded that employees or their representatives have a right to "contest []the withdrawal" of a citation by the Secretary (Pet. App. 10a). In holding that such a contest may be resolved by the Commission, the court below again disregarded the contrary holdings of eight other courts of appeals.

While the circuits are in disagreement on the permissible scope of employee participation before the Commission in employer-initiated contests,¹² each of

¹² Section 659(c) permits employees or their representatives to participate in proceedings before the Commission in one of two ways. They may initiate a proceeding themselves to contest the reasonableness of the abatement period specified in a citation; in such cases, the agenda of the Commission hearing is strictly limited to that issue. See, e.g., *American Cyanamid*, 671 F.2d at 648. Section 659(c) also directs the Commission to "provide affected employees or representatives of affected employees an opportunity to participate as parties" in employer-initiated proceedings. Several courts of appeals have held that employees may participate in employer-initiated proceedings as full parties, and thus may address issues other than the reasonableness of the abatement time. See, e.g.,

the courts of appeals to have considered the question—with the exception of the court below—has held that employees lose all of their rights to be heard by the Commission in such proceedings once the Secretary's citation or the employer's notice of contest has been withdrawn.¹³ *Midland*, 760 F.2d at 785; *Englehard*, 748 F.2d at 1472-1473; *Whirlpool*, 722 F.2d at 1420-1421; *Monsanto*, 722 F.2d at 1160; *American Petrofina*, 718 F.2d at 1353; *Mobil Oil*, 713 F.2d at 925-930; *American Cyanamid*, 671 F.2d at 649-650 & n.7; *Sun Petroleum*, 622 F.2d at 1186.¹⁴

As noted above, the Secretary is the "exclusive prosecutor of OSH [Act] violations" (*American Cyanamid*, 671 F.2d at 649); Congress gave employees no independent rights to proceed against em-

Whirlpool, 722 F.2d at 1419; *American Petrofina*, 718 F.2d at 1348-1352; *American Cyanamid*, 671 F.2d at 647-649. One court of appeals, however, has held that employees who participate in proceedings of this sort may challenge only the reasonableness of the abatement period. *Sun Petroleum*, 622 F.2d at 1186. See also *Monsanto*, 722 F.2d at 1160; *Mobil Oil*, 713 F.2d at 927 n.13, 928-929.

¹³ If the Secretary leaves a modified citation outstanding, affected employees retain their right under Section 659(c) to initiate proceedings of their own challenging the reasonableness of the abatement period. See note 12, *supra*.

¹⁴ The court below thus erred in asserting that its conclusion is consistent with decisions by the Fifth, Eighth, and District of Columbia Circuits (Pet. App. 10a). While those courts have held that employees may participate as full parties in employer-initiated proceedings (see note 12, *supra*), they also have made clear that "included within the [Secretary's] prosecutorial power is the discretion to withdraw or settle a citation issued to an employer" (*American Cyanamid*, 671 F.2d at 659)—even "over employee objections." *Id.* at 650 n.7. See *Whirlpool*, 722 F.2d at 1421; *American Petrofina*, 718 F.2d at 1353.

ployers under the Act.¹⁵ The other courts of appeals accordingly have reasoned that nothing in the Act grants employees such rights simply because the Secretary at one point had issued a citation against their employer. As a result, once the Secretary decides to forgo or abandon prosecution of a citation, a controversy of the sort that the Commission is empowered to decide no longer exists, whether or not interested employees wish to challenge the Secretary's decision. See *American Cyanamid*, 671 F.2d at 649-650 & n.7.

3. That the court of appeals' ruling is unsound in principle is demonstrated by an examination of its practical impact. The OSH Act, of course, covers an enormous "administrative territory" (*American Petrofina*, 718 F.2d at 1353), while the resources that the Secretary can devote to the investigation and prosecution of safety violations obviously are limited. Cf. *Leg. Hist.* 152. And as Congress itself recognized, some violations of safety standards are rela-

¹⁵ In addition to the rights enumerated in Section 659(c)—which come into play only after the Secretary has issued a citation—Congress gave employees several other procedural rights that may assist them in influencing the Secretary's administration of the Act. Employees may participate in the promulgation of safety standards and in proceedings for variances from those standards (29 U.S.C. 655(b)(1), (6)(B)(v) and (d)); may request the Secretary to conduct a workplace inspection (29 U.S.C. 657(f)(1)) and have a representative accompany the compliance officer during such an inspection (29 U.S.C. 657(e)); may obtain informal review of the Secretary's decision not to issue a citation after he conducts a workplace inspection that was requested by an employee (29 U.S.C. 657(f)(1) and (2)); and may bring a mandamus action against the Secretary for failure to seek an injunction restraining an imminent danger in the workplace. 29 U.S.C. 662(d).

tively less significant than others. See 29 U.S.C. 658(a) (the Secretary may issue "a notice in lieu of a citation with respect to de minimis violations which have no direct or immediate relationship to safety or health"). It is therefore not surprising that administrative hearings often are avoided even in cases involving contested citations (see *American Petrofina*, 718 F.2d at 1353); the Department of Labor informs us that, of the 4348 citation items contested in 1984 (out of the 133,399 such items issued), some 1000 were withdrawn by the Secretary—more than 600 pursuant to settlement agreements and more than 300 unilaterally.

In taking such a course, the Secretary has pointed to a wide range of factors relating to the exercise of his prosecutorial discretion: that settlement will most efficaciously resolve the identified safety violation (see, e.g., *Whirlpool*, 722 F.2d at 1421); that, even in the absence of a formal settlement, the employer's voluntary efforts have largely remedied the violation (e.g., *American Bakeries Co.*, 1984 O.S.H. Dec. (CCH) ¶ 26,951, *reprinted at* Pet. App. 23a-30a); or that, in light of the employer's willingness to contest the citation, the case is not worth prosecuting on the merits (see *Whirlpool*, 722 F.2d at 1418), would be difficult to prove (e.g., *American Bakeries Co.*, *supra*), or simply is supported by insufficient evidence (e.g., *Copperweld Steel Co.*, 1984 O.S.H. Dec. (CCH) ¶ 26,956, *reprinted at* Pet. App. 31a-35a). Indeed, similar factors in part motivated the Secretary's decision to withdraw the citation in this case, where he explained that "no useful purpose, either with respect to employee safety or the proper allocation of the Secretary's resources, would be served by litigation" (App., *infra*, 5a). See generally *Chaney*, slip op. 10.

Decisions of this sort, which are related directly to the ordering of enforcement priorities and the exercise of prosecutorial judgment, involve matters that are uniquely within the Secretary's discretion. As such, they turn on questions of enforcement policy that the Commission—and the courts of appeals, to which all Commission orders may be appealed (29 U.S.C. 660)—institutionally are not equipped to analyze or review. See *Chaney*, slip op. 10. And if it may force the Secretary to pursue cases that he has decided to drop, the Commission—without being able to consider the totality of factors that have inclined the Secretary to conclude that certain prosecutions are more important or meritorious than others—would essentially take the Secretary's place as the body that allocates prosecutorial resources.¹⁶

¹⁶ Indeed, when citations or employer contests are withdrawn pursuant to a settlement, the availability of Commission review might directly frustrate the Secretary's aim of achieving an expeditious cure for safety violations. Because the effect of a citation requiring the abatement of a violation is stayed until the Commission enters a final order in an employer-initiated contest (see 29 U.S.C. 659(b)), Commission review of settlements " 'delays the day when a final order requiring abatement may be entered.' " *Marshall v. Oil, Chemical & Atomic Workers*, 647 F.2d 383, 387 (3d Cir. 1981) (citation omitted). Even were the Commission to enter an order approving the settlement immediately upon receiving notice of the agreement, that order would be stayed for 30 days while finality attached. 29 U.S.C. 659(c). And in cases in which the Commission actually reviews the settlement or withdrawal of the citations, considerably longer delays are likely to attach; in this case, for example, Commission review took almost six years. See pages 6-7, *supra*. See also, e.g., *Whirlpool*, 722 F.2d at 1417 (Commission review of a settlement took over three years).

It is for similar reasons that this Court has held under the Administrative Procedure Act that an agency's "[r]efusal[] to take enforcement steps" presumptively is unreviewable. *Chaney*, slip op. 9, 11. The court of appeals' contrary conclusion here, which subjects the Secretary to a unique set of constraints in an area in which "the need for uniformity is apparent" (*American Petrofina*, 718 F.2d at 1353), accordingly will serve only to disrupt the fair and effective enforcement of the Act.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

CHARLES FRIED

Acting Solicitor General

KENNETH S. GELLER

Deputy Solicitor General

CHARLES A. ROTHFELD

Assistant to the Solicitor General

FRANCIS X. LILLY

Solicitor of Labor

ALLEN H. FELDMAN

Acting Associate Solicitor

BARBARA J. JOHNSON

Attorney

Department of Labor

JULY 1985



APPENDIX A

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

No. 82-3771/73

RAYMOND J. DONOVAN, ETC. (82-3771),
CUYAHOGA VALLEY RAILWAY Co. (82-3773),
PETITIONERS

v.

UNITED TRANSPORTATION UNION, ET AL. (82-3771),
SECRETARY OF LABOR, ET AL. [sic] (82-3773),
RESPONDENTS

[Filed Mar. 1, 1985]

Before: MARTIN and JONES, Circuit Judges, and
PECK, Senior Circuit Judge

ORDER

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and less than a majority of the judges having favored the suggestion, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman
JOHN P. HEHMAN
Clerk

APPENDIX B

[Jan. 18, 1977]

Mr. William S. McLaughlin
Executive Secretary
Occupational Safety and
Health Review Commission
1825 K Street, NW.
Washington, DC 20006

Re: *Secretary of Labor v. Cuyahoga Valley Railway
Company*

OSHRC Docket No. 76-118

Dear Mr. McLaughlin:

This letter is submitted in response to the direction for review of Commissioner Cleary on the following issue:

Whether the Administrative Law Judge erred in vacating the citation and notification of proposed penalty based on the Secretary's determination that pursuant to section 4(b)(1) of the Act the Secretary did not have authority to issue the citation?

It should be noted that this direction followed the Secretary's motion to dismiss the citation and complaint in this case and Administrative Law Judge Erwin L. Stuller's order granting this motion, dated September 21, 1976. The Secretary's motion, however, was objected to by an authorized employee representative, who questioned the Secretary's section 4(b)(1) determination, alleging that respondent fell within the exemption at 49 CFR 217.13(b)(1) which states:

(b) This part does not apply to (1) A railroad that operates only on track inside an installation which is not part of the general railroad system of transportation; * * *

Therefore, the authorized employee representative argued, respondent was outside the scope of any FRA regulations promulgated at 49 CFR 217.

After re-evaluation of the above-captioned case the Secretary has decided not to file a brief for the reasons that follow. At the outset we note that the record does not contain any evidence upon which to base a determination of the section 4(b)(1) issue. This is particularly true with respect to the issue noted above and raised in the authorized employee representative's brief and, as we understand, to be the main subject of respondent's brief (as described orally to this office by respondent's counsel), to wit, whether respondent is exempt from the Federal Railroad Administration (FRA) requirements contained in 49 CFR 217, pursuant to 49 CFR 217.3(b)(1).

Nevertheless, the Secretary determined on the basis of the facts available to him when the motion was made that respondent did not fall within the exemption set forth at 49 CFR 217.3(b)(1) and therefore was subject to the regulations in 49 CFR 217.

Furthermore, the Secretary determined that section 4(b)(1) precluded application of the Act with respect to that portion of the Secretary's citation and complaint alleging that respondent failed to adequately *instruct* employees in the proper method of coupling and uncoupling ingot buggy cars (see paragraph V of the complaint) because that condition was cognizable under an FRA regulation, 49 CFR 217.11

which requires railroads to *instruct* their employees on the meaning and application of their operating rules.

However, with respect to the other portions of the citation and complaint alleging that respondent failed to enforce coupling and uncoupling rules and that respondent failed to ensure that an adequate safe clearance was maintained between ingot buggy stools, it is the Secretary's position that section 4(b)(1) does not preclude issuance of these portions of the citation. There are no FRA regulations which cover these conditions. Rather these conditions are addressed by respondent in its operating rules, which the FRA requires respondent to file pursuant to 49 CFR 217.7. Although the Secretary is familiar with respondent's operating rules, the record contains no evidence on them. Moreover, said rules do not constitute an exercise of authority pursuant to section 4(b)(1). See the argument in the Secretary's brief to the Review Commission in *Secretary v. Northwest Orient Airlines*, OSHRC Docket No. 13649, pp. 10-28 (enclosed herein) that an employer's formulation of rules pursuant to requirements of an agency does not constitute an exercise of statutory authority by an agency under section 4(b)(1). Nevertheless, the Secretary determined in his prosecutorial discretion that these additional portions of the citation and complaint should not be litigated because an evaluation of the evidence herein led to the conclusion that these allegations are inter-related with the allegation of respondent's failure to instruct, with respect to which the Secretary has determined section 4(b)(1) does [sic] apply, and that no useful purpose, either with respect to employee safety or the proper allocation of the Secretary's resources, would be served by litigation of these additional allegations.

With respect to the authorized employee representative's objection to the Secretary's motion to dismiss the Secretary reiterates his position that an employee has no right to object to the Secretary's determination of whether to withdraw a citation. See *Secretary v. Geuder, Paeschke & Frey Co.*, OSHRC Docket No. 6661, CCH OSHD 1974-75 ¶ 19,510: ALJ 1975, review directed).

In conclusion, in light of the Secretary's desire not to litigate this case and the undeveloped record herein the Commission should summarily affirm the judge's order granting the Secretary's motion to dismiss without considering the section 4(b)(1) issue. See *Secretary v. Molinos de Puerto Rico*, OSHRC Docket No. 2939, 5 OSHRC 59 (RC 1973).

Sincerely,

Baruch A. Fellner
Counsel for Regional Litigation

